INDEX

	Page
Opinions Below	1
Jurisdiction	1
Question Presented	1
Statement of the Case	2
Argument	
Point I. Petitioner's Constitutional Rights Have Not Been Infringed	7
Point II. The Judgment of the Appellate Court Was Correct Even Though Erroneous Reasons Therefor Were Assigned in the Opinion	11
Point III. The "Caveat" Violates Respondents' Constitutional Rights	19
Conclusion	24

CITATIONS

Cases:

Advance-Rumely Thresher Co. v. Jackson, 287 U.S. 283, 77 L. Ed. 306	20
Brinkerhoff-Faris Trust & Sav. Co. v. Hill, 281 U.S. 673, 74 L. Ed. 1107	9
Cheairs v. McDermott Motor Co., 175 Ark. 1126, 2 S.W. (2d) 1111	8
Crisco v. Murdock Acceptance Corp., et al., — Ark. —, 258 S.W. (2d) 551	1, 6, 9, 12
General Contract Purchase Corp. v. Holland, 196 Ark. 675, 119 S.W. (2d) 535	8
Great Northern Ry. Co. v. Sunburst Oil & Refining Co., 287 U.S. 358, 364, 77 L. Ed. 360, 366	9, 10
Hare v. General Contract Purchase Corp., 220 Ark. 601, 249 S.W. (2d) 973	7, 11, 17, 19, 20
Harper v. Futrell, 204 Ark. 822, 164 S.W. (2d) 995	8, 9
Lloyd v. Scott, 4 Peters 205, 225, 7 L. Ed. 833, 840	16
Ruffner et al. v. Hogg, 66 U.S. 115, 17 L. Ed. 38	16, 17
Standard Motors Finance Co. v. Mitchell Auto Co., 173 Ark. 875, 293 S.W. 1026	8

Statutes:

Constitution of State of Arkansas, Article 19, Section 13	13
United States Constitution, Fourteenth Amendment	19, 20, 21
28 U.S.C. 1257 (3)	1

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

WALLACE A. CRISCO ..... *Petitioner,*

v. No. 356

MURDOCK ACCEPTANCE CORPORATION ET AL. ..... *Respondents.*

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARKANSAS

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the chancellor in the trial court consists of the court's decree (R. 137). It is not reported. The opinion of the Supreme Court of Arkansas (R. __) is reported at ___ Ark. ___, 258 S.W. (2d) 551.

JURISDICTION

The jurisdiction of this court has been invoked under 28 U.S.C. 1257 (3).

QUESTION PRESENTED

The quesion is whether petitioner has been deprived of a right guaranteed by the Federal constitution by virtue of the refusal of the Arkansas Supreme Court to accord to him the benefit of a judicial edict issued by that court.

Petitioner contends that a "caveat" promulgated by the Supreme Court of Arkansas, announcing that it would at an undetermined future date overrule a long line of its own decisions, vested in him a right which the Supreme Court of Arkansas denied to him. Respondents deny that petitioner has acquired any right which he has been denied.

STATEMENT OF THE CASE

Petitioner is a citizen and resident of Little Rock, Arkansas. Respondent, James Hampton, is a legitimate automobile dealer doing business in Little Rock, Arkansas. Respondent, Murdock Acceptance Corporation, is a corporation qualified to do business in Arkansas and expressly licensed by that State to engage in the finance business and the purchase and sale of commercial paper.

On April 5, 1952, the petitioner, Crisco, purchased a used Mercury automobile from respondent, Hampton. The advertised cash price of the Mercury automobile was $1,475. Petitioner was unable to pay cash and negotiated with the respondent, Hampton, for the purchase of the automobile on credit. An agreement was reached whereby petitioner undertook to convey a used Chevrolet automobile to respondent, Hampton, as a down payment on the Mercury and to pay the sum of $62 a month for a period of eighteen months (R. 78-84).[1]

The agreement is evidenced by a written contract (Exhib. 5, R. 133). This contract is reproduced on page 3.

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[1]The petitioner, under the guise of poverty, has asked this court to excuse him from printing the record, although he admits on page 3 of his typewritten brief that the question before the court is of utmost importance, in that hundreds of other litigants are equally interested with him in the decision of this case, since they have claims now pending in the courts of Arkansas the decisions in which are being delayed pending the outcome of this petition. In the absence of a printed record, or even of a copy of the typewritten record filed with the clerk, respondents are unable to furnish accurate citations to the record. In this brief, whenever a reference to the record is made by page number, the page number is that of the record on file in the Supreme Court of Arkansas. These page numbers may not correspond to the page numbers of the official record before this court.

LITTLE ROCK

A FINANCE SERVICE

5

CONDITIONAL SALE CONTRACT

ORIGINAL

A1077

Contract Number

The undersigned seller hereby sells, and the undersigned purchaser or purchasers, jointly and severally hereby purchase(s), subject to the terms and conditions hereinafter set forth, the following property, delivered and acceptance of which in good order is hereby acknowledged by purchaser, viz:

New or Used	Year Model	No. Cyl.	Make Trade Name	Type of Body If Truck, Give Tonnage	Model Letter or Number	Motor No.	Manufacturer's Serial No.
Used	1950	8	Mercury 4 Door Sedan		50L	6042977M	

RADIO—Make _____ Model _____ Serial No. _____ Utility Trailer—Make _____ Model _____ Serial No. _____

For a TOTAL TIME PRICE of - $ 1801.00 (9)

Payable in an amount ON OR BEFORE DELIVERY of - - - - - - - - - - - - - - - - $ 685.00 (5)

Leaving a DEFERRED BALANCE of - $ 1116.00 (8)

Payable at the office of Murdock Acceptance Corporation to be hereafter designated in installments of 18 - $ 62.00 (7a)

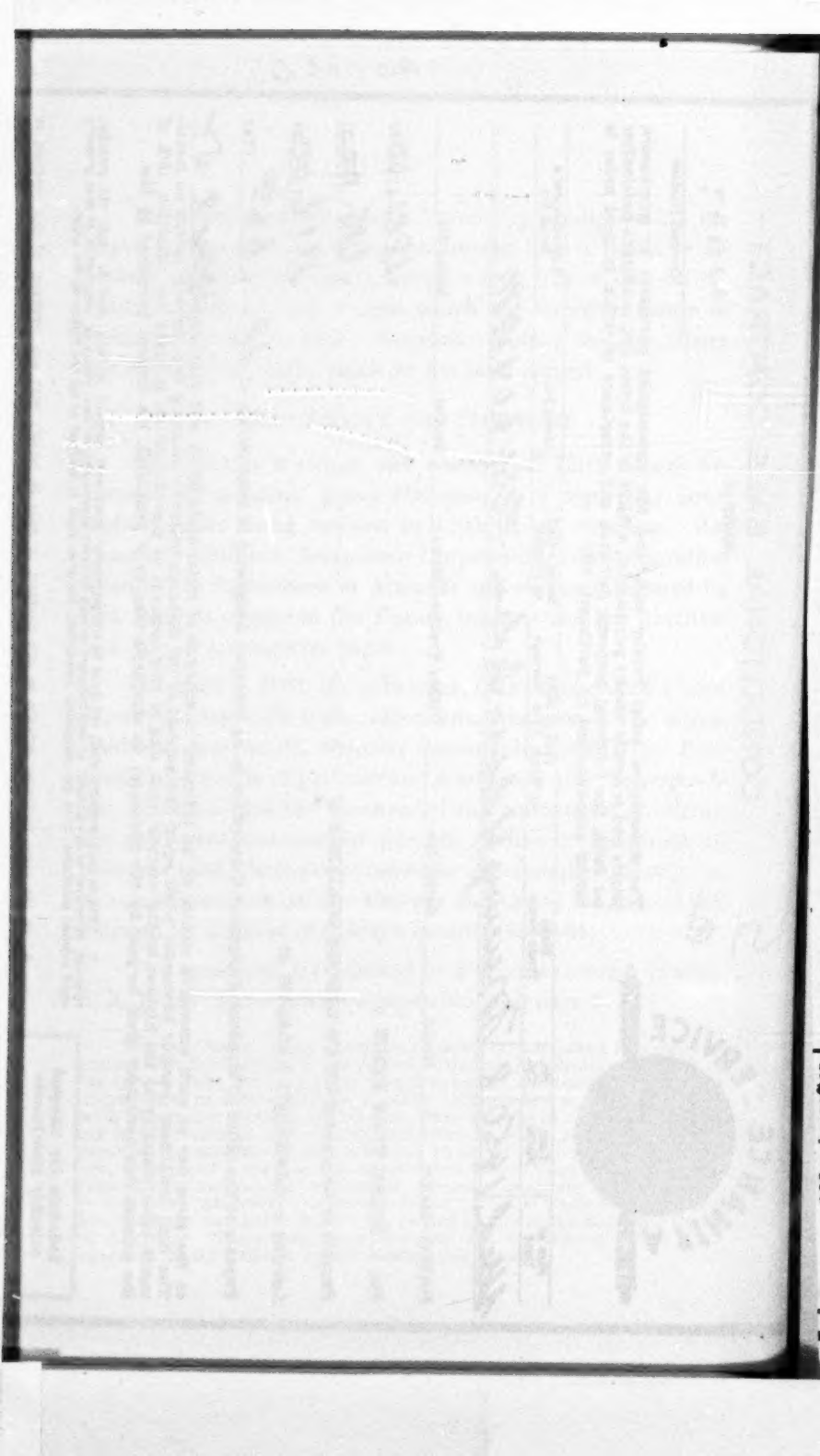
on the same day of each successive month, or as indicated in schedule of instalments below, and commencing May 8 1952. The final instalment payable hereunder shall equal the amount of the deferred balance remaining due. Interest is due on instalments after maturity at the highest lawful contract rate, and, if this contract be placed with an attorney for collection, 15% of the amount due hereunder shall be paid by the purchaser as attorney's fees, or if prohibited, the amount permitted by law.

Schedule for unequal monthly instalments

$

1. Title to said property shall not pass to the purchaser until said amount is fully paid in cash. No transfer, renewal, extension or assignment of this contract or any interest thereunder, or loss, injury or destruction of said property shall release purchaser from his obligation hereunder; assignee shall be entitled to all the rights of the seller.

2. In the event purchaser defaults on any payment or fails to comply with any condition of this contract or



$_____	3 Mos. hereafter
$_____	4 Mos. hereafter
$_____	5 Mos. hereafter
$_____	6 Mos. hereafter
$_____	7 Mos. hereafter
$_____	8 Mos. hereafter
$_____	9 Mos. hereafter
$_____	10 Mos. hereafter
$_____	11 Mos. hereafter
$_____	12 Mos. hereafter
$_____	_____
$_____	_____
$_____	_____
$_____	_____
$_____	_____
$_____	_____

3. No warranties, expressed or implied, representations, promises or statements have been made by seller unless endorsed hereon in writing.

4. Purchaser shall keep said property free of all taxes, liens and encumbrances; shall not use same illegally, improperly or for hire; shall not remove same from the state without permission of the holder of this contract; shall not transfer any interest in this contract or said property. Any sum of money paid by the seller in payment or discharge of taxes, liens and encumbrances on said property shall be secured by and under this contract. The proceeds of any insurance, whether paid by reason of loss, injury, return premium or otherwise, shall be applied toward the replacement of the property or payment of this obligation, at the option of seller. Seller may insure said property against fire and theft, or any accidental physical damage to the car to protect purchaser, seller or seller's assignee. Purchaser agrees to pay the premium upon demand and that on failure to do so, payment of said premium shall be secured by this contract.

5. Time is of the essence of this contract, and if purchaser default in complying with the terms hereof, or seller deems the property in danger of misuse or confiscation, seller or any sheriff or other officer of the law may take immediate possession of said property without demand (possession after default being unlawful), including any equipment or accessories thereto; and for this purpose seller may enter upon the premises where said property may be and remove same. Such repossession shall not affect seller's right, hereby confirmed, to retain all payments made prior thereto by the purchaser hereunder. Seller may resell said property, so retaken, at public or private sale, without demand for performance, with or without notice to purchaser (if given, notice by mail to address below being sufficient), with or without having such property at place of sale, and upon such terms and in such manner as seller may determine; seller may bid at any public sale. From proceeds of any such sale, seller shall deduct all expenses for retaking, repairing and selling such property, including a reasonable attorney's fee. The balance thereof shall be applied to amount due; any surplus shall be paid over to purchaser; in case of deficiency purchaser shall pay the same with interest.

6. Seller shall have the right to enforce one or more remedies hereunder, successively or concurrently. Purchaser hereby waives the right to remove any legal action from the court originally acquiring jurisdiction and waives all homestead and other property exemption laws. Any provision of this contract prohibited by law of any state shall as to said state be ineffective to the extent of such prohibition without invalidating the remaining provisions of the contract.

Executed in Triplicate, one copy of which was delivered to and retained by purchaser, THIS 5 **DAY OF** April, 19 53
(Do not date on Sunday)

Purchaser Signs x Wallace Criss By _____ (If Company) (Title) (Street) (Town) (State)
(Purchaser's Signature)

Seller Signs Phillips Auto Co By James Hampton (If Company) (Title) (Town) (State)
(Seller's Signature)

Homer Jones
(Witness)

SIGN IN INK

_____ (Witness)

BE SURE TO SIGN ON BACK IN PROPER PLACES

For use in Arkansas

Contemporaneously with the execution of the contract, the petitioner made the following acknowledgment in writing:

> "I have been quoted a total cash price and a total time price and elect to buy for the total time price. I warrant that title to the above-described trade-in vehicle is good in me and subject to no incumbrances except as shown."

This writing is contained in a document marked "Exhibit 1" (R. 128). It is reproduced on page 5.

Petitioner received the original invoice (Exhib. 1) and a copy of the contract (Exhib. 5) at the time he concluded the purchase of the Mercury automobile. The transaction was completed on the afternoon of Saturday, April 5, 1952. Petitioner denies that he received a copy of the contract (Exhib. 5), but the record reflects that on Monday, April 7, he made application to the State Department of Revenues for a certificate of title on the Mercury automobile, and at that time delivered to the department a copy of Exhibit 5. A photostat of this copy appears in the record as Exhibit 6-A (R. 134).

After the sale had been consummated, and after the petitioner had received the automobile, and respondent, Hampton, had received and accepted the contract of purchase containing the agreement to pay the deferred purchase price (Exhib. 5), Hampton sold that piece of commercial paper to Murdock Acceptance Corporation.

Thereafter, petitioner made monthly payments falling due May 8 and June 8, 1952.

On June 20, 1952, petitioner filed this suit, alleging the purchase of the Mercury automobile on credit, but claiming fraud, and also that the transaction did not constitute a purchase of the automobile by him and a sale of his deferred purchase money paper, but, in reality, was a fanciful loan of money at a usurious rate of interest, and praying that the con-

CAR INVOICE:

JAMES HAMPTON'S
PUBLIC AUTO COMPANY
400 - 404 WEST THIRD STREET
TELEPHONE 5-4629
North Little Rock, Arkansas

STOCK No. 585

1
D

SOLD TO: Wallace Cross
ADDRESS: 912 west 2nd Little Rock Ark

DATE: 4/25/52 SALESMAN: Ballentine

Year	Make	Model	New or Used	Body Type	Serial Number	Motor Number
1950	Mercury	4 Door	used	4 Door		

USED CAR TRADE IN:
Make Chevrolet
Model 1948
Body Type 2 Door
Serial No.
Motor No. (New) BB-602435
License No. 30-830
Equipment:
Lien Holder Murfee Accepted
Address Little Rock, Ark

O. P. S. CEILING PRICE:
Cash Price of Car 1425.00
Optional Equipment R&H
Extra Equipment Overdrive
Total Cash Price 1425.00
Time Price Differential 376.00
Total Time Price 1801.00
Optional or Extra Equipment:
Description Price

SETTLEMENT:
Total Time Price 1801.00
Cash Down Payment
Total Allowance on Trade In 850.00
Less Lien 170.00
Net Trade In 685.00
Total Deductions 685.00
Unpaid Time Balance 1116.00

I have been quoted a Total Cash Price and a Total Time Price and elect to buy for the Total Time Price. I warrant that title to the above described trade-in vehicle is good in me and subject to no encumbrances except as shown

Payable in 18 Payments of $62.00 Each Beginning May 8th 1952

CAR INVOICE:

JAMES HAMPTON'S
PUBLIC AUTO COMPANY
400 - 404 WEST THIRD STREET
TELEPHONE 5-4629
North Little Rock, Arkansas

STOCK No. 585

1
D

SOLD TO: Wallace A Crisco
ADDRESS: 912 west 3rd Littlerock Ark
DATE: 4/25/52 SALESMAN: Ballentine

Year	Make	Model	New or Used	Body Type	Serial Number	Motor Number
1950	Mercury	4 door	used	4 door		

USED CAR TRADE IN:
Make Chevrolet
Model 1948
Body Type 2 Door
Serial No.
Motor No. (New) BH-602435
License No. 30-830
Equipment:
Lien Holder Murdock Acceptance Corp
Address Little Rock, Ark

O. P. S. CEILING PRICE:
Cash Price of Car 1475.00
Optional Equipment R&H
Extra Equipment Antenna
Total Cash Price 1475.00
Time Price Differential 326.00
Total Time Price 1801.00
Optional or Extra Equipment:
Description / Price

SETTLEMENT:
Total Time Price 1801.00
Cash Down Payment
Total Allowance on Trade In 855.00
Less Lien 170.00
Net Trade In 685.00
Total Deductions 685.00
Unpaid Time Balance 1116.00

Payable in 18 Payments of $ 62.00 Each Beginning May 8th 1952

At The Office of:
Murdock Acceptance Corp
6th & Pierce
Little Rock, Ark

I have been quoted a Total Cash Price and a Total Time Price and elect to buy for the Total Time Price. I warrant that title to the above described trade-in vehicle is good in me and subject to no encumbrances except as shown

X Wallace A. Crisco

This invoice was fully completed when signed by the purchaser and is correct.
PUBLIC AUTO COMPANY

Subscribed and sworn to before me this 5 day of May 1952

Notary Public [illegible] By Homer Jones

12-24-53

"BUY WITH CONFIDENCE!"

tract of purchase be cancelled and that title to the automobile be vested in him, free from any lien or claim of either respondent, and free of any obligation on his part to pay the remainder of the deferred purchase price.

The trial court, after hearing the evidence, made the following finding of facts:

> "On or about the 5th day of April, 1952, the plaintiff purchased from the defendant, James Hampton, a 1950 model Mercury four-door sedan, in payment for which he traded in a 1948 model Chevrolet two-door sedan and executed a contract agreeing to pay $62 per month for eighteen months; * * * that the defendant, James Hampton, or his agent quoted to the plaintiff both a cash price and a time price for the vehicle purchased by the plaintiff; that said prices were bona fide prices; * * * that no fraud or deceit was practiced upon the plaintiff; that subsequent thereto the contract of sale was sold and transferred by the defendant, James Hampton, to the defendant, Murdock Acceptance Corporation, and that the defendant, Murdock Acceptance Corporation, bought same in good faith for a valuable consideration and is a holder in due course of said instrument; that the defendant, James Hampton, was not the agent of the defendant, Murdock Acceptance Corporation, for any purpose, * * * that neither the defendant, James Hampton, nor the defendant, Murdock Acceptance Corporation, made a loan of money or of anything of value to the plaintiff; and that neither of said defendants made a charge for the forbearance of money, and that the time price charged by the defendant, Hampton, to the plaintiff was a bona fide time price made in connection with a bona fide sale of property; * * *." (R. 137, 138).

The Supreme Court affirmed (R._____), ____ Ark. _____, 258 S.W. (2) 551.

ARGUMENT

I.

PETITIONER'S CONSTITUTIONAL RIGHTS HAVE NOT BEEN INFRINGED.

Petitioner rests his claim to a vested right, of which he alleges he has been unconstitutionally deprived, upon a "caveat" promulgated by the Supreme Court of Arkansas on May 26, 1952, in *Hare* v. *General Contract Purchase Corp.*, 220 Ark. 601, 249 S.W. (2d) 973. The "caveat" warned that as of June 30, 1952 (the effective date of the decision), the court would repudiate a long line of its own decisions and would thereafter hold that the difference between the cash price and the credit price of property sold by the retailer would be considered as interest for a loan of money if the retailer, subsequent to the sale, discounted the customer's deferred payment obligation to another at a price that would enable such other to obtain more than 10% on his investment.

The "caveat" reads:

> "We, therefore, give this *caveat* to the public generally:
>
> "(1) We leave unimpaired the doctrine that a seller may, in a *bona fide* transaction, increase the price to compensate for the risk that is involved in a credit sale. But there may be a question of fact as to whether the so-called credit price was *bona fide* as such, or only a cloak for usury.
>
> "(2) If the seller, whether he has quoted two prices to the purchaser or not, subsequently transfer the title documents to an individual or company which is engaged in the business of purchasing such documents, at a price which permits the transferee to obtain more than a return of 10% on its investment, then a question of fact arises as to whether the seller increased his cash price with the reasonable assurance that he could so discount the paper to such individual or finance company. If that reasonable assurance existed, then the transaction is in substance a loan, and may be attacked for usury.

"(3) When finance companies or purchasers of title paper supply dealers with a set of forms and a schedule for credit price increases, such will tend to show that the dealer had reasonable assurance that such finance company or purchaser of the paper would take the paper at such discount.

"What we are trying to do is, to keep the spirit of the constitutional mandate against usury abreast of present day commercial transactions. We give this *caveat* prospectively, so as not to entrench on property rights acquired by reason of our previous opinions, and this *caveat* applies to all transaction entered into after this opinion becomes final." (220 Ark. 609, 610, 249 S.W. (2) 978)

Petitioner does not claim that he acquired any vested right to become the owner of the automobile without any obligation on his part to pay for it under the law of Arkansas as it existed at the time he made the purchase. The law at that time was firmly established, as evidenced by the opinions in *Standard Motors Finance Co.* v. *Mitchell Auto Co.*, 173 Ark. 875, 293 S.W. 1026; *Cheairs* v. *McDermott Motor Co.*, 175 Ark. 1126, 2 S.W. (2d) 1111; *General Contract Purchase Corp.* v. *Holland*, 196 Ark. 675, 119 S.W. (2d) 535, and *Harper* v. *Futrell*, 204 Ark. 822, 164 S.W. (2d) 995. The court had consistently held that no loan of money or forbearance of debt was involved in sales of property on extended time payments. We quote from two of these cases:

"The fact that the difference between the cash price of the LaSalle car purchased by appellee and the credit price amounted to more than 10 per cent. per annum on the cash price would not make the note usurious. There is nothing in the law that will prevent a dealer from charging a higher price when he sells his goods on time than he would have charged if the purchase price had been paid in cash. The amount of the increase in price is not limited by the law, but it depends upon the agreement of the parties." *General Contract Purchase Corp.* v. *Holland*, 196 Ark. 675, 679, 119 S.W. (2) 535.

> "This court has held that the finance charges in connection with the sale of property under a conditional sales contract are not paid for a loan of money, but are a part of the purchase price which the purchaser agrees to pay, and that there is no usury in a transaction of this kind." *Harper* v. *Futrell,* 204 Ark. 822, 164 S.W. (2d) 995.

Had the Arkansas court merely followed its previous decisions to the effect that the transaction was a sale of property and not a loan of money and that therefore usury could not be involved, petitioner could not have demonstrated any invasion of his constitutional rights. But, he states, since the court announced that its previous decisions were erroneous and would not in the future be considered as the law, his Federal constitutional rights are invaded because the court refuses retroactive application of its new rules of construction. As pointed out by the court in its opinion on rehearing (R. ___, ___ Ark. ___, 258 S.W. (2) 557), petitioner's constitutional rights are not infringed by a refusal of the court to give retroactive effect to its departure from precedent.

The court cited *Great Northern Ry. Co.* v. *Sunburst Oil & Refining Co.,* 287 U.S. 358, 364, 77 L. Ed. 360, 366, wherein it was held that a State, in defining the limits of adherence to precedent, might make a choice for itself between the principle of forward operation and that of relation backward, and that the Federal constitution was not involved in the determination of that issue.

Brinkerhoff-Faris Trust & Sav. Co. v. *Hill,* 281 U.S. 673, 74 L. Ed. 1107, cited by petitioner, is not in point. There the court, by giving retroactive operation to a departure from precedent, effectively denied a litigant his day in court, and because of such denial a constitutional issue was raised. It amounted to a denial of due process in its primary sense.

In the case at bar, petitioner has had his day in court and now alleges that the decision was erroneous, a matter which does not confer appellate jurisdiction on this court.

The chancellor in the case at bar merely followed the pattern set by a long line of decisions of the appellate court. He held that there was a bona fide sale of property, that no loan of money was made, and that, therefore, there could be no usury. No Federal constitutional rights were infringed by the decision of the chancellor and no invasion of such rights can be predicated on his refusal to declare the contract void on account of usury. The posture of the case from the standpoint of constitutional law was the same after the decision of the appeal as it was after the trial before the chancellor. *Great Northern Ry. Co.* v. *Sunburst Oil & Refining Co.*, 287 U.S. 358, 363, 77 L. Ed. 360, 366. Therefore, no constitutional issue can be based on the mere fact that the Supreme Court of Arkansas affirmed the decree of the trial court.

Inherent in petitioner's argument is the assumption that on a given state of facts he is entitled to a judicial declaration of usury, the refusal of which invades some undesignated right granted to him under the Federal constitution. So far as the Federal constitution is concerned, the State of Arkansas is not required to enact or enforce statutes regarding usury. If neither the statutes of Arkansas nor its constitution contained any restraints on interest charges, the petitioner would not be deprived of any rights guaranteed by the Federal constitution. The fact that such restraints are imposed by both constitution and statute does not change the Federal constitutional aspects of the case. The interpretation of these documents is primarily a question for local determination. The Federal constitution does not entitle petitioner to any particular interpretation of those documents—not even a reasonable one—so long as it applies to all citizens alike. Petitioner here does not allege any special treatment of his rights—indeed, he complains because his rights have been adjudged to be identical with the rights of countless litigants in the past.

II.

THE JUDGMENT OF THE APPELLATE COURT WAS CORRECT EVEN THOUGH ERRONEOUS REASONS THEREFOR WERE ASSIGNED IN THE OPINION.

We controvert petitioner's statement that the Supreme Court of Arkansas found as a fact that the contract was usurious and then refused to give effect to the Arkansas constitution and statutes.

By its affirmance of the chancellor the Arkansas Supreme Court has held that the sale of the automobile and the sale at a discount of the deferred purchase money notes here involved did not violate the Arkansas constitution and statutes defining and prohibiting usury. It is certain that no transaction identical with this would violate the Arkansas usury laws if it had its inception prior to June 30, 1952. The "caveat" has not changed the law. No decision on the question making the change promised by the "caveat" has been rendered. The decision (judicial determination) in this case is that there was no usury. The opinion states:

> "* * * here the chancellor's holding that there was no usury is affirmed (R. ____, ____ Ark. ____, 258 S.W. (2) 555.)

We therefore submit that the lower court has made no finding of usury and that any remarks in the opinion susceptible to that construction are mere speculations upon what the court might hold under similar circumstances if and when it gives effect to the "caveat" in the *Hare* case. However, if it be assumed that the lower court found as a fact that the contract was usurious, the petitioner nevertheless is entitled to no relief in this court for the reason, among others, that the record does not support any such conclusion. A finding of usury must be based upon paragraph (2) of the "caveat" in the *Hare* case.

Whether the "caveat" will be given effect by this court is of vital importance to respondents. Hampton is an automobile dealer whose very existence depends upon his ability to sell his deferred purchase money paper at a price which banks and finance companies will pay. Murdock Acceptance Corporation has hundreds of thousands of dollars invested in Arkansas. It is licensed by that State and has a valuable business there which constitutes a property right. If the "caveat" had been applied in this case respondents would have been the petitioners here, earnestly insisting that they were being unconstitutionally deprived of valuable property rights. It is reasonable to anticipate that if and when the "caveat" is applied to them they will promptly apply to this court for relief.

Mr. Justice Ward, a member of the Arkansas Supreme Court, in his concurring opinion in the court below forcefully cites the dangers feared by the respondents (R. ___, ___ Ark. ___, 258 S.W. (2) 555.)

> "I deem it appropriate to concur in this case chiefly for the purpose of commenting on the *caveat* contained in the case of *Hare* v. *General Contract Purchase Corporation*, Law Reporter, May 26, 1952, since the opinion indicates the *caveat* will be followed hereafter. By reference to the *Hare* case it will be found that the *caveat* is divided into three sections. I can see nothing wrong with section (1).
>
> "Section (2), in my judgment, contains dangerous implications. It is realized that this *caveat* was probably intended only as a general guide for future decisions, but at the same time its language is calculated to so disturb legitimate business practices as to justify pointing out inherent dangers before they are incorporated into the body of law by decisions of this Court.
>
> * * *
>
> "Surely no one doubts that the discounting of commercial paper is a legitimate occupation. In Vol. 55 A.J. at Page 344 it is stated:

> "'Bills and notes, like other property, may be bought and sold on such terms as may be agreed upon, and a discount at any rate, * * *'
>
> "The apparent intent on the part of this Court to protect the public from usurious transactions is laudable, but it occurs to me that we should be very careful in our effort to act as guardian that we do not inadvertently endanger or unjustly impede the transaction of legitimate business, particularly in the important realm of the fair and confident circulation of commercial paper."

The constitution of Arkansas, Article 19, Section 13, provides in part that "all contracts for a greater rate of interest than ten percent per annum shall be void, * * *." The contract in the case at bar is reproduced on page 3 herein. It does not provide for any interest until maturity, and then only "at the highest lawful contract rate." The contract is not a cloak or guise for the loan of money, and there is not one word of evidence in the record to justify any such finding. The contract represents an actual bona fide sale of a Mercury automobile by the respondent, James Hampton, d/b/a Public Auto Company, to the petitioner, Wallace Crisco. The auto company is not a lending institution. It is engaged in the business of buying and selling automobiles. The petitioner, Crisco, did not apply to the Public Auto Company for a loan of money. He called at its place of business for the purpose of purchasing an automobile. This is not an instance wherein one desiring to borrow money is required to purchase an unwanted item of property at an exorbitant price in order to secure the loan. It is simply a transaction involving the purchase by Crisco and sale by Public Auto Company of an automobile. The petitioner, Crisco, knew the cash price of the automobile, and he knew the credit price. These prices were itemized on the invoice reproduced on page 5 herein, and Crisco acknowledged therein that he voluntarily elected to purchase at the time price.

In order for this court to hold that petitioner has been deprived of a right guaranteed by the Federal constitution, petitioner must at least prevail upon this court to judicially determine that petitioner did not purchase the automobile at a credit price, but that he purchased at a cash price and borrowed the purchase money either from Public Auto Company or from Murdock Acceptance Corporation.

To reach this conclusion the court must ignore the written instruments and the petitioner's own testimony. Petitioner described the transaction as follows:

"Q. (Mr. McHaney, continuing) You weren't able to pay $1,475—you didn't have $1,475, did you?

"A. No.

"Q. So, in lieu of that, what did you agree?

"A. I agreed to give my car as a down payment.

"Q. Plus what—plus eighteen payments of $62?

"A. Yes, sir." (R. 79)

And:

"Q. Mr. Crisco, I understood from your testimony just before we recessed that your agreement on this deal was to turn in a used car and to execute a contract to make eighteen payments at $62 each. That constituted your obligation in the purchase of the vehicle? That is right, is it not?

"A. That is right." (R. 83)

Mrs. Crisco, who accompanied the petitioner when the automobile was purchased, testified as follows:

"Q. * * * So you knew you weren't buying for the cash price of $1,475?

"A. Yes, sir.

"Q. You knew you were paying something in addition to that cash price for the privilege of buying on time?

"A. Yes.

"Q. You knew and understood that?

"A. (Witness shakes head affirmatively.)" (R. 104-105)

The only proof with respect to the sale of the paper to Murdock Acceptance Corporation is the admission in its answer:

> "5. Subsequent to the 5th day of April, 1952, James Hampton, doing business as Public Auto Company, offered to this defendant for purchase a negotiable instrument executed by the plaintiff in the principal sum of $1,116.00, payable in eighteen (18) monthly installments of $62.00 each. Said instrument was a conditional sales contract on the automobile described in the complaint, which said contract was executed by the plaintiff. Defendant states that it in good faith, without notice or knowledge of any infirmity or defect in said contract, purchased the same from James Hampton, doing business as Public Auto Company, for good and valuable consideration, and this defendant is a bona fide holder in due course of said contract." (R. 6)

To sustain the petition this court would be compelled to concur in the following pronouncement in the "caveat," which actually has never been invoked by the court which issued it.

> "(2) If the seller, whether he has quoted two prices to the purchaser or not, subsequently transfer the title documents to an individual or company which is engaged in the business of purchasing such documents, at a price which permits the transferee to obtain more than a return of 10% on its investment, then a question of fact arises as to whether the seller increased his cash price with the reasonable assurance that he could so discount the paper to such individual or finance company. If that reasonable assurance existed, then the transaction is in substance a loan, and may be attacked for usury." (p. 609)

The petitioner's own testimony requires a finding that both petitioner and his wife knew the automobile could be purchased cheaper for cash than it could be purchased on time

payments, and that with this knowledge petitioner voluntarily chose to purchase on the credit price. This he had the legal right to do, and, by the same token, we submit that the seller, Public Auto Company, had the legal right to charge more on a time sale than it would have charged on a cash sale, and we further submit that the increased price does not represent interest charged for a loan of money or for the forbearance of a debt under the constitutional and statutory provisions in Arkansas regarding usury. In the case of *Ruffner et al.* v. *Hogg*, 66 U.S. 115, 17 L. Ed. 38, this court said:

> "But it is manifest that if A propose to sell to B a tract of land for $10,000 in cash, or for $20,000 payable in ten annual installments, and if B prefers to pay the larger sum to gain time, the contract cannot be called usurious. A vendor may prefer $100 in hand to double the sum in expectancy, and a purchaser may prefer the greater price with the longer credit; and one who will not distinguish between things that differ, may say, with apparent truth, that B pays a hundred per cent. for forbearance, and may assert that such a contract is usurious; but whatever truth there may be in the premises, the conclusion is manifestly erroneous. Such a contract has none of the characteristics of usury; it is not for the loan of money, or forbearance of a debt." Cf. *Lloyd* v. *Scott*, 4 Peters 205, 225, 7 L. Ed. 833, 840.

It is believed that the rule just quoted states the law in every State in the Union as it now exists, including Arkansas, and it will continue to be the law in Arkansas unless and until the Supreme Court of that State, by a decision and not a caveat, declares the law to be otherwise.

The Supreme Court of Arkansas in its opinion commented on the method used by the vendor to determine the credit price of the automobile, and then concluded:

> "The whole transaction is no more or less than Hampton's selling his automobile on the cash basis of $1,475 and

after deducting the down payment, charging more than 10% per annum on the balance owed."

We submit that the record does not justify any such conclusion, and that this conclusion is arbitrary and unreasonable. The fact that the vendor, by doing what the Court said he did, could have arrived at the same credit price on the vehicle is wholly beside the point. The question is, what did the vendor do? The uncontradicted evidence clearly reflects that he did not do what the Supreme Court said he did. He quoted two prices to the prospective purchaser, who voluntarily elected to purchase at the higher credit price.

The vendor was not required to sell the automobile to the petitioner, and petitioner was not required to buy it. The vendor fixed the price at which he was willing to sell the car on a time basis, and Crisco voluntarily agreed to purchase at that price. Interest as such was not a consideration in the transaction. Undoubtedly, the vendor arrived at his credit price by adding to the cash price, which presumably is cash market value, the cost of insurance plus the amount of discount he anticipated would be charged when he offered the petitioner's contract for sale on the market.

It is submitted that the Arkansas Supreme Court has refused to distinguish between things that differ, and, as pointed out by this court in *Ruffner et al.* v. *Hogg*, supra, the contract is a contract of sale and not a contract for a loan of money or for the forbearance of a debt. For that reason the affirmance of the decree of the trial court was correct, even though erroneous reasons therefor were assigned in the opinion.

Reading the decision of the Arkansas Supreme Court in this case together with its "caveat" in the *Hare* case, it seems certain that the "caveat" would have been followed and this transaction held usurious if it had had its inception subsequent to June 30, 1952. It may therefore become important to examine

the "caveat" to ascertain whether, if applied to this case, it would vest in petitioner a right to become the owner of the automobile free of all obligation to pay for it, and would deprive Murdock Acceptance Corporation of any means of recovering the money it paid to acquire the paper.

It will be perceived that if Hampton had not sold the commercial paper here involved it would have been a credit sale involving no question of interest or usury under Section (1) of the "caveat." It is only the subsequent sale of the paper at a discount greater than 10% which magically converts the transaction from a sale of an automobile on credit to a loan of money, and only then if the seller had reasonable assurance that he could sell his deferred purchase money paper at a discount to a finance institution.

It is apparent that no seller of durable consumer goods can hereafter sell his merchandise on credit "whether he has quoted two prices to the purchaser or not," unless he has sufficient capital to carry all of his own paper. If there exists a market for his paper which reasonably assures him that he can sell at a discount, but at a rate that may exceed 10%, he is warned and all purchasers of commercial paper are warned that the transaction will be held to be usurious and void if it takes place in Arkansas.

In brief, the court has said:

(1) A bona fide credit sale does not involve usury, regardless of the difference between the cash price and the credit price, because the transaction is a sale and not a loan of money.

(2) The transaction described in (1) above does involve usury if at the time it was negotiated the vendor had reason to believe he could sell the customer's obligation in the open market.

The legality of the transaction is thus made to depend on the state of mind of the vendor, the question being at the time of sale, did he intend to retain the customer's obligation among his own assets, or did he intend to negotiate it to a bank or some other institution engaged in the business of purchasing such obligations?

We realize that this court does not pass upon the wisdom of opinions in our highest State courts. Nevertheless, the question presented by the petition is whether the petitioner's constitutional rights were invaded by virtue of the affirmance of the trial court by the Supreme Court of Arkansas. In determining that issue we submit that this court properly may determine whether that affirmance was correct, even though the Supreme Court of Arkansas assigned erroneous reasons therefor.

III.

THE "CAVEAT" VIOLATES RESPONDENTS' CONSTITUTIONAL RIGHTS.

We know that this court does not render advisory opinions and that normally it will not consider an issue injected by the court below in a dictum, an issue not actually determined by the court below. Here, however, the petitioner's complaint of an alleged deprivation of constitutional rights is based upon this dictum, to-wit, the "caveat" in the *Hare* case as reaffirmed by the court in its opinion in this case.

We have already stated that had the judgment below been in favor of petitioner the present respondents would be the petitioners in this case. The "caveat," although not applied by the court below, was approved by it as the law of the State. We submit that the constitution and statutes of Arkansas as construed in the "caveat" do violence to respondents' rights under the Fourteenth Amendment of the Constitution of the United States. If this conclusion is sound, then petitioner is entitled to no relief in this court, for to afford him relief would override the constitutional rights of the respondents.

A State may not arbitrarily restrict the liberty of contract. This is forbidden by the Fourteenth Amendment. *Advance-Rumely Thresher Co.* v. *Jackson,* 287 U.S. 283, 77 L. Ed. 306. Respondents submit that the constitution and statutes of Arkansas as construed by the Supreme Court of Arkansas do arbitrarily restrict the freedom of contract.

The Arkansas constitution and statutes as construed by the Arkansas Supreme Court in the *Hare* case, which construction was reaffirmed in the opinion below, provide:

(1) A seller of property may sell his property for cash, or he may sell it on credit, and in the latter event he may increase the selling price by any amount he desires, even though the increase exceeds the cash price by an amount exceeding the equivalent of 10% simple interest.

(2) If, however, the vendor in a credit sale transaction where the credit differential exceeds 10% thereafter sells his customer's credit obligation to another at a discount equivalent to more than 10% simple interest, the customer's obligation is rendered void *ab initio* on grounds of usury, if the vendor at the time of the original sale had reasonable assurance that he could so discount the obligation.

(3) If the vendor had no such assurance at the time of the original sale, then the obligation remains valid, even though it be subsequently discounted at more than 10% simple interest.

The above propositions may be illustrated as follows:

Suppose that M (merchant) has an item for sale bearing a cash price of $1,000. B (buyer) wants to purchase, but has no cash. M agrees to sell the item to B on credit for $1,200, payable $100 a month for twelve months, and the transaction is closed on that basis, B giving M a note evidencing the debt. This transaction is perfectly legal and binding under the con-

stitution and statutes of Arkansas if M retains B's note, even though the credit price increase exceeds 10% simple interest.

Suppose M then sells and assigns B's note to F (finance company) for $1,000, thereby replenishing his working capital. B's note thereupon becomes void and unenforceable under the constitution and statutes as construed by the Supreme Court of Arkansas.

But, suppose M sells and assigns B's note to F for $1,135.20. F can then realize not more than 10% simple interest on its investment. B's obligation remains valid and binding.

Suppose, however, that when M accepts B's note for $1,200 he has no knowledge as to whether he can dispose of the note on the open market and therefore determines to retain it among his own assets. Three weeks later, finding himself badly in need of funds, M sells the note to F for $1,000. In this instance the note remains valid and binding in the hands of F because at the time M took the note from B he had no assurance that he could sell it and, as a matter of fact, at the time had no intention of offering it for sale.

It is submitted that there is no reasonable basis upon which the validity of constitutional or statutory provisions giving rise to the above conclusions can be supported. We submit that such constitutional and statutory provisions constitute an arbitrary and unreasonable restraint on the freedom of contract, thereby violating the due process clause of the Fourteenth Amendment to the Federal Constitution.

As pointed out in the concurring opinion of Justice Ward in the court below, the discounting of commercial paper is a legitimate occupation and such paper legally may be bought and sold on such terms as may be agreed upon. The constitution and statutes of Arkansas do not attempt to regulate the amount of discount that may be applied in the purchase of

commercial paper generally. Thus, if a bank holds a customer's note and desires to remove it from its assets, it may sell that note to another bank or to any interested buyer for any discount it pleases, and the note will remain valid and binding, even though it may have been acquired by the last holder at a discount greater than 10%. The constitution and statutes as interpreted by the court attempt to restrict the transferability of only those notes and documents given in payment for the deferred price of merchandise purchased on credit and then only under circumstances that are dependent wholly on the state of mind of the vendor of the merchandise, the question being, did the vendor intend to retain the customer's obligation among his own assets, or did he intend to negotiate it to a bank or some other institution engaged in the business of purchasing such obligations, and did he at the time have reasonable assurance that he could so negotiate it?

The constitution and statutes of Arkansas as construed by the court do not regulate the amount of price increase that may be imposed by a vendor in consideration for a sale on credit. The vendor is free to increase his price in such amount as he desires, unrestricted by any question of usury. The constitution and statutes merely limit the right of the vendor to sell his customer obligations to others, and, by the same token, the right of others to purchase such obligations. They attempt to prevent a merchant from selling his customer obligations at less than a minimum price, the penalty therefor being the confiscation of the note itself, for it is unenforceable in the hands of the transferee and cannot reacquire its validity by a subsequent retransfer to the transferor.

We submit that such statutory and constitutional provisions are illegal and void, in that they are discriminatory, and that they arbitrarily restrict the freedom of contract of the respondents and others similarly situated.

The constitution and statutes of Arkansas are arbitrary and unreasonable, in that they discriminate in favor of large merchants and against small merchants. He who has large working capital and can afford to carry his own customer obligations is permitted to run his business without interference. He may sell his property at such prices as he pleases, and he may increase the cash price by whatever amount he pleases when the property is sold on credit. Yet the small merchant who must sell or hypothecate customer obligations may not increase his cash price by an amount greater than the equivalent of 10% simple interest, for, if he does so, the deferred payment obligation becomes void upon its subsequent transfer. A penalty is imposed on merchants for exercising normal business judgment, i.e., determining whether there is a market for deferred payment obligations.

It is respectfully submitted that there is no reasonable basis upon which such statutory or constitutional discriminations can be justified.

CONCLUSION

This case has unusual aspects. Neither petitioner nor respondents are completely happy about the results of this action. Although the respondents prevailed in the sense that the prayer of their answer was granted, they nevertheless are fearful that in obtaining that relief their future is jeopardized.

Though we are convinced the petition for certiorari is without merit and should be denied, we can but hope that this court may make some comment about the "caveat" or warning issued by the court below.

As we view the case, there are two fundamental issues:

(1) May a court by the artificial expedient of changing the meaning of words and acts convert a recognized sale of property on credit into a loan of money so as to bring the transaction within constitutional and statutory prohibition? In other words, may it judicially declare that henceforth sales of property on credit shall be loans of money and therefore subject to prohibitions of usury statutes? A well-known writer on constitutional law has said:

> "If we must use terms taken from the deity to adorn the brows of men, we cannot still divest them of their meaning."

(2) May a State by its constitution or statutes arbitrarily interfere with the free transfer of commercial paper obtained by a vendor in payment for property sold, while no similar restraints are imposed on commercial paper obtained by other means?

Respectfully submitted,

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